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Re: Brookline November 20, 2019, Special Town Meeting Article 21 - Case No. 9752

Dear Ms. Hurley:

On behalf of Mothers Out Front Massachusetts,[1] the Emmett Environmental Law & Policy Clinic at Harvard Law School respectfully submits these comments regarding Brookline's authority to adopt the bylaw titled "Prohibition on New Fossil Fuel Infrastructure in Major Construction" (Article 8.39). We ask that you approve this exercise of municipal authority as it is consistent with state and federal law.

In brief, Article 8.39 reflects a traditional exercise of municipal authority. Municipal limitations, or even prohibitions, on products or commercial activities within their boundaries are not new. This Office has on multiple occasions reviewed and approved such bylaws with support from the Supreme Judicial Court (SJC). Nor is it new for local prohibitions to regulate issues that state statutes also address, at times comprehensively. Such forays into areas that are subject to state laws are permissible unless the strong presumption of validity for local bylaws is overcome. With respect to preemption, a high hurdle must be cleared before finding preemption of a local law: there must be a "sharp conflict" between a local law and state provisions.[2] Including for the reasons discussed below, that hurdle is not cleared with respect to Article 8.39 and G.L. Chapter 164 and the Massachusetts Building Code.

I. Municipal Bylaws Have a Strong Presumption of Validity and the Attorney General Has a Limited Power of Disapproval

"It is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." *Town of Amherst v. Attorney General,* 398 Mass. 793, 795-96 (1986) (internal citations

[1] Mothers Out Front is a nonprofit organization of mothers, grandmothers, and other caregivers working for a swift, complete, and just transition away from fossil fuels to ensure a healthy and safe future for all children.

[2] *Bloom v. City of Worcester,* 363 Mass 136, 154 (1973).

omitted). This instruction from the Supreme Judicial Court was delivered in the context of describing the scope of the Attorney General's review of bylaws under G.L. ch. 40, § 32.

Pursuant to the Massachusetts Constitution and state laws, municipalities like Brookline have broad authority to adopt bylaws, through both home rule authority and police powers. This authority, and the presumption of validity awarded to municipal bylaws, was recently described by this Office as follows:

> The state constitution's Home Rule Amendment, as ratified by the voters in 1966, confers broad powers on individual cities and towns to legislate in areas that previously were under the Legislature's exclusive control. Home Rule Amendment, Mass. Const. amend. art. 2, § 6. . . .
>
> In addition, G.L. c. 40, § 21, specifically authorizes municipalities to adopt certain categories of local legislation, including '[f]or directing and managing their prudential affairs, preserving peace and good order...'[3] 'Considerable latitude is given to municipalities in enacting local by-laws.' *Mad Maxine's Watersports, Inc. v. Harbormaster of Provincetown*, 67 Mass. App. Ct. 804, 807 (2006).

MLU-9358, at 2 (Oct. 4, 2019). The adoption of a bylaw by voters at a town meeting, as occurred in this instance, "is both the exercise of the town's police power and a legislative act," and as such "the vote carries a 'strong presumption of validity.'"[4] MLU-6195, at 2 (Feb. 29, 2012) (citing *Duran v. IDC Bellingham, LLC,* 440 Mass. 45, 50-51 (2003)).

With respect to preemption in particular, Massachusetts courts are generally reluctant to find that a state law preempts a municipal action unless (i) the state law includes an explicit preemption provision, or (ii) the municipal action somehow interferes with the purpose of the state law. As explained by the SJC:

> If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation, unless the Legislature has expressly forbidden the adoption of local ordinances and by-laws on that subject.

Bloom, 363 Mass. at 156. The SJC more recently reiterated this principle in a 2018 decision in which the Court also found that "in determining whether the Legislature intended to preempt local ordinances and bylaws, it is appropriate to consider whether the subject matter at issue has traditionally been a matter of local regulation." *Roma, III, Ltd. v. Board of Appeals of Rockport*, 478 Mass. 580, 591 (2018). Deference to a governing body's exercise of its historic police

[3] "The phrase 'internal police' refers not to municipal police departments but is, instead, 'a term sometimes applied to the police power, or power to enact laws in the interest of the public safety, health, and morality.'" MLU-6273, at 24-25 (Sept. 5, 2012).

[4] As discussed in other letters submitted to the Attorney General in this case, Article 8.39 seeks to advance public health and environmental objectives, both areas that are traditionally considered squarely within a municipality's police powers.

powers is also reflected in federal precedent. For example, the United States Supreme Court has started preemption analyses with an assumption that the historic police powers of a state were not meant to be preempted by a federal statute unless Congress clearly signaled that intent.[5]

With this presumption of validity as a starting point, the Attorney General's "limited standard of review requires her to approve or disapprove bylaws based solely on their consistency with state and federal law, not on any policy views she may have on the subject matter or wisdom of the bylaw." MLU-6273, at 1-2 (Sept. 5, 2012) (citing *Town of Amherst*, 398 Mass. at 795-96, 798-99). Thus, for example, the fact that a local bylaw may be only an incremental step to solving a problem does not provide a basis for invalidating the regulation. *See, e.g., RYO Cigar Ass'n, Inc., v. Bos. Pub. Health Comm'n*, 79 Mass. App. Ct. 822, 829 (2011) (finding that a public health commission was "entitled to act incrementally" to protect residents from the harmful effects of tobacco use and was not "saddled with a choice between comprehensive regulation and no regulation at all.")

II. Article 8.39 is Akin to and Consistent with Prior Municipal Bylaws that Were Approved by the Attorney General's Office and Upheld by the Courts

Brookline's bylaw is "novel" only in the sense that it is the first to regulate the use of a *particular* product; municipal product regulation is not itself a new concept. Being "first" does not change the standard of review for a municipal bylaw. As described by this Office in its review of the first municipal plastic water bottle ban:

> Towns have used these home-rule powers to prohibit, within their borders, certain commercial activities that state statutes generally recognize as lawful and that are widely accepted in the remainder of the Commonwealth--for example, coin-operated amusement devices, or self-service gas stations. *Amherst*, 398 Mass. at 798 n.8. The Supreme Judicial Court has upheld such by-laws, and has overturned the Attorney General's disapproval of them where they did not create any specific conflict with state law. *Amherst*, *id*.; *see also Milton v. Attorney General*, 372 Mass. 694, 695-96 (1977). The Attorney General thus has no power to disapprove a by-law merely because a town, in comparison to the rest of the state, has chosen a novel, unusual, or experimental approach to a perceived problem.

Case # 6273, pg. 2 (Sept. 5, 2012).

[5] *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (citations and internal quotations omitted); *California Div. of Labor Standards Enforcement v. Dillingham Construction NA, Inc.*, 519 US 316, 325 (1997).

The Attorney General has approved a number of municipal limitations on products, such as single use plastic bags,[6] certain limitations on types of firearms[7] and plastic straws in food or retail establishments,[8] and commercial activities, such as a seasonal prohibition on the use of gas-powered leaf blowers,[9] including in areas subject to state laws and regulations.

III. Article 8.39 is Not Preempted by Either Chapter 164 or the Massachusetts Building Code

A. Article 8.39 Does Not Create or Impose any Substantive or Procedural Requirement for Gas Companies, Thus Any Effect on Gas Companies Is Incidental and Not Preempted

Article 8.39 does not impose obligations on gas companies, create any new permitting or financing requirements, or otherwise alter or change the state standards and requirements applicable to gas companies. There is no new obligation created for gas companies. The bylaw is thus distinguishable from prior court decisions that have found that municipal regulation of gas companies is preempted.[10]

Even when a state law includes explicit preemption language or is interpreted to preempt a field, the scope of the preemption is not boundless. As the SJC has explained:

> The existence of legislation on a subject . . . is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject. If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation.

Bloom, 363 Mass. at 156. Incidental effects of a municipal law on the regulated area are permissible. *Cf. Boston Gas Co. v. City of Boston*, 35 Mass. L. Rep. 142 at *1 (2018) (noting that *non-incidental* local rules and ordinances may be preempted by Chapter 164) (emphasis added).

The United States Supreme Court has likewise noted the permissibility of incidental effects on a preempted field, explaining that, even when a federal law preempts a field, state programs with only "incidental" effects on that field are allowed. In the context of looking at the scope of the Federal Energy Regulatory Commission's ("FERC") authority to set wholesale electricity rates,

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[6] MLU-9434 (Aug. 2. 2019), MLU-8228 (Jan. 27, 2017) and MLU-7422 (Feb. 19, 2015).

[7] *Town of Amherst*, 398 Mass. at 797-98 ("Some of c. 131's guidelines do concern the safe use of certain firearms, see, e.g., §§ 58, 60-64, 66-70, but the Amherst by-law [prohibiting the use of some firearms] in no way frustrates those sections. 'The mere existence of statutory provision for some matters within the purview of the by-law will not render [the by-law] invalid as repugnant to law.'").

[8] MLU-8973 (Aug. 28, 2018).

[9] MLU-6481 (Oct. 17, 2012).

[10] This is not to suggest that all municipal bylaws that impose obligations on gas companies would be preempted.

the Supreme Court noted that "[s]tates, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016). In making this statement, the Supreme Court pointed to its prior decision in *Oneok, Inc. v. Learjet*, in which it determined that whether the Natural Gas Act preempted a state law turned on "the target at which the state law aims." 135 S. Ct. 1591, 1600, 1605 (2015) (distinguishing between "measures aimed directly at interstate purchasers and wholesalers for resale, and those aimed at subjects left to the States to regulate") (internal citations omitted).

In this instance, Article 8.39 may incidentally affect the business of natural gas companies, but it does not interfere or conflict with the Department of Public Utility's authority "to regulate and control the storage, transportation and distribution of gas and the pressure under which these operations may respectively be carried on." G.L. ch. 164, § 105A. Nor does Article 8.39 interfere with the SJC's interpretation of the purpose of Chapter 164 as "ensuring uniform and efficient utility services to the public." *Boston Gas Co. v. City of Somerville*, 420 Mass. 702, 706 (1995). Nothing in Article 8.39 would prevent residents in Brookline from obtaining utility services[11] and, as discussed further below, nothing in Chapter 164 requires that all residents in Massachusetts have access to natural gas as a heating source.

The analysis here is akin to the one this Office conducted when reviewing whether Concord's proposed plastic water bottle ban was preempted by the Federal Food, Drug and Cosmetic Act, which includes regulations for the processing and bottling of bottled drinking water, allowable levels of contamination and labeling requirements. In determining that the municipal action was not preempted this Office explained that:

> Although these federal requirements are extensive and detailed, we find nothing in Article 32 that conflicts with them. Article 32 does not establish any standard for the identity, quality, or labeling of bottled water. Nor do we find anything in any of the cited federal regulations that mandates that bottled water be sold in PET bottles of one liter or less. Simply put, the FDA requirements applicable to bottled water are aimed at ensuring consumer knowledge, health, and safety – not at ensuring that bottled water be available in types of containers that consumers may desire, or types of containers that may have some impact on the generation of solid waste.

MLU-6273, at 15-16 (Sept. 5, 2012).[12]

[11] This is particularly true in light of the exemption and waiver provision in Article 8.39.

[12] At the federal level, analysis of state Zero Energy Credits ("ZECs") programs by the 2nd and 7th Circuits is also informative. For example, in finding that the Federal Power Act, and the federal government's control over wholesale electricity rates, did not preempt the state laws, the 2nd Circuit noted that "even though the ZEC program exerts downward pressure on wholesale electricity rates, that incidental effect is insufficient to state a claim for field preemption under the FPA." *Coalition for Competitive Elec. v. Zibelman*,906 F.3d 41, 54 (2d Cir. 2018), *cert. denied, Elec. Power Supply Ass'n v. Rhodes*, 139 S. Ct. 1547 (2019); *see also Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018), *reh'g denied* (Oct. 9, 2018), *cert. denied*, 139 S. Ct. 1547 (2019) ("As the Supreme Court remarked in *Hughes*, the exercise of powers reserved to the states under §824(b)(1) affects interstate sales.

In this situation, Chapter 164 regulates how both electric distribution companies and natural gas distribution companies should function with the intent of ensuring that Massachusetts residents have access to utility services. To the extent Chapter 164 regulates the sale of gas by public utilities, those requirements apply *when* a sale occurs; they do not require sales to occur. Nothing in Massachusetts' laws requires natural gas to be available in all communities or to all consumers. In fact, there are large sections of Massachusetts where gas service is not available.[13]

B. Neither Chapter 164 nor the Building Code Requires the Use or Option to Use a Specific Fuel Source in Buildings

Just as Chapter 164 does not require the use of a particular fuel source in a building, the Building Code does not require a particular form of energy use.[14] Rather, the Building Code standards regarding natural gas infrastructure are only applicable when such infrastructure is installed. Precedent shows that not all infrastructure or uses that are regulated by the Building Code have to be available for use at all buildings. For example:

- The Building Code includes standards regarding heliports (Section 412.7 of the Mass. Building Code), but municipalities are allowed to ban their use. *See e.g.*, MLU-7071 (May 1, 2014); *see also, Roma, III, Ltd.* 478 Mass. at 580-81 (upholding a municipal law banning private heliports without some form of approval, variance or special permit. In this instance, the SJC's analysis focused on potential preemption by G.L. ch. 90, regarding Motor Vehicles and Aircraft, and did not address the Building Code.)

- The Building Code regulates manufactured housing (Appendix E of the Mass. Residential Code), but communities can ban the use of trailers for residential use (subject to the limitations of G.L. ch. 40A, Section 3). *See, e.g.*, MLU-6731 (Aug. 20, 2013).

- The Building Code includes standards for structures and uses such as night clubs, high-rise buildings and aircraft carriers, but communities are allowed to prohibit or condition such uses.

This approach is consistent with approval of municipal actions under other state laws. For instance, in *Milton v. Attorney General,* the SJC reviewed a town's bylaw prohibiting self-service gas stations. In that case, there was a state rule (Rule 43), which the court treated as a statute, that provided that self-service gas stations "shall be permitted" on stated conditions. The

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Those effects do not lead to preemption; they are instead an inevitable consequence of a system in which power is shared between state and national governments.")

[13] *See* Massachusetts Department of Public Utilities, *Map of Natural Gas Providers (2015), by Municipality*, https://www.mass.gov/files/documents/2017/01/xl/naturalgas2015.pdf.

[14] If the Building Code's provisions regarding natural gas were interpreted to require the use of natural gas in a building, then its provisions regarding solar panels would likewise have to require the use of solar panels in buildings.

court noted that, "[s]uperficially, therefore, the by-law forbids what Rule 43 permits, and is inconsistent with Rule 43." 372 Mass. 694, 695 (1977). However, the Court concluded that the State purpose was to "assure the safety of self-service gas stations, if there are any, rather than to encourage the opening of such station. The by-law in no way derogates from safety. It follows that it is 'not inconsistent' with the State regulation." 372 Mass 694 (1977), 695-696 *Id.* at 696. Another example comes from this Office's review of plastic water bottle bans and the consideration of preemption claims with respect to G.L. ch. 94, Section 323A, which prohibits the sale of plastic containers in Massachusetts unless they include one of seven codes regarding the type of plastic used. In that case, this Office found that the statute did not embody "a legislative judgement that sales of containers manufactured out of any of the types of plastic listed therein must be permitted in the Commonwealth, regardless of their content" because:

> Section 323A does not say that sales of plastic containers shall be permitted, provided that they are properly labeled. Rather, Section 323A prohibits sales of plastic containers unless they are properly labeled. In short, Section 323A does not expressly preempt local action regarding container sales; while it may well occupy the field of labeling plastic containers by the type of plastic involved, Article 32 does not enter that field; and Article 32 does not conflict with Section 323A.

MLU-6273, at 19 (Sept. 5, 2012).

Prohibiting the use of a product, like natural gas, does not regulate a topic covered by the Building Code. To the extent that the use of natural gas is still permitted in Brookline, Article 8.39 does not change or conflict with the requirements of the Building Code.

C. Chapter 164 Does Not Protect a Consumer Base for Specific Companies or Industries

The "franchise" for gas companies originated as an objective to protect consumers – not to protect a company's consumer base. What the "franchise" does is give gas companies privileges in the public streets "as a free gift from the public."[15] What it does not do is guarantee a "right" to do business with all residents of a community.

As described by the SJC:

> Our statutes are founded on the assumption that, to have two or more competing companies running lines of gas pipe and conduits for electric wires through the same street would often greatly increase the necessary cost of furnishing light, as well as cause great inconvenience to the public and to individuals from the unnecessary digging up of the streets from time to time, and the interference with pavements, street railway tracks, water pipes and other structures.

[15] House No. 38, Board of Gas Commissioners, *First Annual Report to the Legislature*, at 36 (Jan. 29, 1886), https://archives.lib.state.ma.us/handle/2452/742705.

Weld v. Gas & Electric Light Comm'rs, 197 Mass. 556, 558-559 (1908); *see also* House No. 38, Board of Gas Commissioners, *First Annual Report to the Legislature*, at 15 (1886) ("[I]t is claimed that one company in any locality, provided it have sufficient appliances of the best kind, can make and deliver gas at a lower price than can be done by two or more companies in the same territory, with the same consumption but with the inevitable increase of capital for duplicate plant, and the expense of additional superintendence.")

Franchise areas are intended to avoid duplicative infrastructure projects, not to dull competition or innovation. There are other mechanisms under Chapter 164, such as rate-making cases, and the Department of Public Utilities' oversight of gas companies to protect the profit margins of gas companies that, as has been demonstrated over time, are available in the event that shifts in energy consumption patterns, such as promotion of energy efficiency measures or integration of roof-top solar, reduce the demand for a utility's products.

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For the reasons discussed herein and in other comment letters submitted in this case, Article 8.39 is an appropriate use of municipal authority that is not preempted by Chapter 164 or the Building Code. We therefore respectfully request that you approve Article 8.39.

Thank you for your attention to these comments.

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